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IN THE

Supreme Court of the United States

October Term, [redacted] 1969

NO. [redacted] 146

C. V. (BUSTER) KERN AND FIDELITY AND DEPOSIT COMPANY OF MARYLAND, *Petitioners*

v.

WILLIAM WHIRL, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

The Opinion of the Court of Appeals for the Fifth Circuit is reported at 407 F2d 781, and the Opinion and Judgment of said Court are printed as Appendix "A" in the Petition, pages 1a-33a. The Per Curiam ruling denying Petition for Rehearing and Rehearing En Banc and amending the Court's Opinion in certain particulars

is printed in Appendix "A" of the Petition at pages 34a-36a.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATUTES INVOLVED

The Civil Rights Act, Revised Statutes, §1979 (1875), 42 U.S.C. §1983, provides as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R. S. Sec. 1979."

Article 5116, Texas Revised Civil Statutes Annotated, provides as follows:

> "Each sheriff is the keeper of the jail of his county. He shall safely keep therein all prisoners committed thereto by lawful authority, subject to the order of the proper court, and shall be responsible for the safekeeping of such prisoners. The sheriff may appoint a jailer to take charge of the jail, and supply the wants of those therein confined; but in all cases the sheriff shall exercise a supervision and control over the jail. Act May 12, 1846, p. 268; G. L. vol. 2, p. 1574; Acts August 26, 1856, p. 88; G. L. vol. 4, p. 506."

QUESTIONS PRESENTED

1. Whether the Civil Rights Act, R. S. §1979, imposes liability upon a sheriff who, without improper motive, continues to confine a prisoner for almost nine months after all criminal charges against such prisoner have been dismissed by judicially approved nolle prosequi recorded in the official minutes of the Court.

2. Whether good faith, probable cause, or the lack of actual knowledge that charges against a prisoner have been dismissed are available as defenses in an action under the Civil Rights Act based on the false imprisonment of such prisoner after the date when the dismissal of all charges is recorded in the official Court minutes.

3. Whether a state statute requiring a sheriff to safely keep all prisoners lawfully committed to his jail, subject to the order of the proper Court, and to exercise supervision and control over the jail, confers a privilege on a sheriff to continue to detain a prisoner after the dismissal of all charges against such prisoner where the sheriff disclaims knowledge of the order of dismissal.

STATEMENT

This case arises under the Civil Rights Act and the Texas common law of false imprisonment. Respondent brought suit against Petitioners, the Sheriff of Harris County, Texas, and the surety on the Sheriff's official bond (R. 27-32), under the Civil Rights Act, REV. STAT. §1979 (1875), 42 U.S.C., §1983.

The evidence is undisputed that Respondent was detained as a prisoner in the Harris County Jail for almost nine months after all charges pending against Respondent

had been dismissed by judicially approved nolle prosequi recorded in the minutes of the Court (R. 138, 193-194, Pl. Ex. 35, R. 137).

Respondent Whirl was arrested on suspicion of felony theft by the City of Houston Police on September 9, 1962, placed in the Houston City Jail that night and transferred two days thereafter to the Harris County Jail (R. 248-250, 677-678). Shortly thereafter, Respondent was bound over to and indicted by the Harris County Grand Jury for burglary and felony theft (R. 90-91, 94-95, Pl. Ex. 2-D and 2-G). At no time was a bond made for Respondent and he was not represented by an attorney (R. 248, 459-471).

On November 5, 1962, the District Attorney of Harris County, Texas, moved by nolle prosequi to dismiss the indictments pending against Respondent citing as ground therefor "evidence insufficient to obtain and sustain a conviction." The motions to dismiss both indictments were approved and granted by the judge in whose Court such indictments were pending (R. 95-96, Pl. Ex. 2-A and 2-E, R. 91). The minutes of that Court for November 5, 1962, recite the dismissal of the two actions against Respondent (R. 138, Pl. Ex. 35, R. 137). However, Respondent was not released from the Harris County Jail until July 25, 1963 (R. 248, 251).

The sheriff testified that he personally did not even know of Respondent's existence until the date of his release on July 25, 1963 (R. 577, 580) but that the deputy whom the sheriff had placed in charge of the jail kept Respondent in custody (R. 577). The deputy in charge of the jail testified that he had no records at the jail indicating receipt of an order to release Respondent

before July 25, 1963 (R. 261). The evidence was clear, however, that the Clerk of the Court placed a Xerox copy of the minutes of the Court for November 5, 1962, reciting dismissals of charges against 15 individuals, including Respondent, in a journal of the District Clerk's Office (R. 178-179, 202, Pl. Ex. 3 at page 96, R. 99), that this journal was regularly taken to the Sheriff's Office (R. 134-137, 184), that Respondent was the only individual on the list who was in jail on November 5, 1962 (R. 264), that several individuals named on the list had never been arrested under the dismissed charges and that the warrants for those individuals were returned to Court by the Warrant Division of the Sheriff's Office on November 9, 1962 (R. 348-352, 358-361). There was testimony that Sheriff's deputies could have learned of the dismissals from sources other than the copy of the Court's minutes attached to the journal (R. 352-355, 357-358). In addition, an entry noting the dismissal of charges against Respondent on November 5, 1962, appeared on the index card kept on Respondent by the Warrant Division of the Sheriff's Office (R. 353-354, Pl. Ex. 40, R. 299-300), although the exact time at which such entry was made was not established (R. 301, 355-356).

Trial was to a jury. At the close of evidence, the trial court overruled Respondent's motion for directed verdict as to liability (R. 594-600) and submitted the case to the jury on special interrogatories as to negligence, contributory negligence, proximate cause and damages (R. 674-686). The jury failed to find negligence on the part of either the Sheriff or Respondent and found that Respondent had suffered no damages by reason of the event in question (R. 699-700). The trial court then overruled Respondent's motion for judgment notwithstanding

the verdict and new trial as to damages (R. 701-717) and entered judgment for the sheriff and his surety on the verdict (R. 721-722). The Court of Appeals for the Fifth Circuit reversed, holding that Respondent had established his causes of action under the Civil Rights Act and under the Texas common law of false imprisonment as a matter of law, and remanded the case for a determination of damages. The Court held that improper motive is not a requirement of a cause of action for false imprisonment under the Civil Rights Act, R. S. §1979, and that neither the jailer's good faith nor the lack of a finding of negligence nor even the lack of actual knowledge of the termination of proceedings against Respondent could justify or confer a privilege for the protracted detention after November 5, 1962.

ARGUMENT

Although principles of undoubted importance are involved in this case, the decision of the Court of Appeals is manifestly correct and there is no such conflict of decision that warrants review by this Court on certiorari.

The operative facts of Respondent's cause are admittedly unique, for no other case has been found after diligent search involving a prolonged purportedly pretrial detention after all criminal charges have been dismissed by nolle prosequi. The uniqueness of the operative facts, however, does not mean that well-established principles of the law of false imprisonment do not apply to such facts with logical and persuasive force. Neither should the uniqueness of such facts persuade this Court to grant certiorari in order to resolve an apparent conflict in the dicta of some Courts of Appeals' opinions in cases under the Civil Rights Act, R. S. §1979, when

such conflict has been substantially settled already by the Courts of Appeals themselves.

Petitioners urge that three questions are presented of which this Court might take cognizance on certiorari. Respondent has worded such questions differently than Petitioners for the purpose of accuracy and firmly believes that the Court, in the exercise of its discretion, should not grant certiorari to review the Court of Appeals' resolution of any one or all of such questions.

Succinctly, Respondent contends in opposition to certiorari that, in this case involving the law of false imprisonment quite apart from the law of false arrest: (1) there is no improper motive requirement for Respondent's cause of action under the Civil Rights Act, §1979, and (2) as a matter of law, the sheriff, as jailer, was not privileged to detain Respondent because of his good faith, his failure to know of Respondent's existence or of the termination of his legal authority to hold Respondent or his reliance on a state statute commanding him to keep prisoners safely subject to the order of a proper court.

Particularly dissuasive of certiorari is the fact that two of the three "Questions Presented" urged by Petitioners are directed only at Respondent's cause of action under the Civil Rights Act §1979 (Petition, 2, 3). Since the Court of Appeals has held that a verdict should have been instructed as to Respondent's action under the Texas law of false imprisonment (Petition, App. 18a-26a) as well as that under the Civil Rights Act and since the measure of damages under each action would be substantially the same, a decision in favor of Petitioners as to any question except number three (Petition,3) would not affect the essential rights of the parties under the Court of Appeals' decision.

I. There is no improper motive requirement in Respondent's action for false imprisonment under the Civil Rights Act.

Petitioners, the sheriff and his surety, have attempted to characterize the Court of Appeals' decision as to the scope of the Civil Rights Act as one imposing "liability without fault" (Petition, 2, 5) and "strict liability" (Petition, 5, 8) where only "innocent conduct" is involved (Petition, 9). Such characterization is not apt for two reasons. First, the Court of Appeals held merely that Respondent did not have the burden of proving that the sheriff had an *improper motive* in confining him in order to make out his prima facie case under the Civil Rights Act (Petition, App. 6a-11a). Second, the generally accepted meaning of "strict liability" could not be applied to the liability found on the record of this case. The usual meaning of the phrase strict liability is "that he (the defendant) is liable although he has taken every possible precaution to prevent the harm, and is not at 'fault' in any moral or social sense." Prosser, *Law of Torts*, 338, §60 (2nd Ed. 1955). It was precisely the failure of the sheriff to take precaution to prevent the harm caused Respondent and the breach of duty to release Respondent for what was held as a matter of law to be an unreasonable length of time that led the Court of Appeals to find "fault" indeed (Petition, App. 16a-18a, 24a-25a, 35a-36a). The only question presented as to the scope of the Act, therefore, would seem to be the Court's ruling on the requirement of improper motive.

The Court of Appeals found that the "improper motive" or "unlawful intent" requirement was the only dispute as to Respondent's statement of a cause of action under the Civil Rights Act since the sheriff did not

contest the facts of deprivation of liberty and due process nor the fact that this conduct was under "color of law" (Petition, App. 5a, ftn. 4). The holding that there is no improper motive requirement is consistent with the language of the Act, decisions of this Honorable Court and the clear trend of decisions of other Courts of Appeal.

There is certainly nothing in the plain language of the Act itself to support a requirement of proof of improper motive. After a thorough analysis of the legislative history of §1979, this Court concluded in *Monroe v. Pape*, 365 U.S. 167, at 180, 81 S. Ct. 473, at 480, 5L. Ed. 2d 492 (1961), that:

> "It is abundantly clear that one reason the legislation was passed was to afford a federal right in Federal Courts because, by reason of prejudice, passion, *neglect*, intolerance *or otherwise*, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." (Emphasis added).

The expansive phrase "or otherwise" and the further caution that "Section 1979 should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions," *Monroe v. Pape*, Supra at 187, make inescapable the conclusion that a claimant under this Act should not have the burden of proving that a defendant's conduct is more blameworthy or reprehensible than that which would establish liability under the prevailing common law.

Moreover, although dissenting as to the meaning of the phrase "under color of law," Justice Frankfurter concluded that "Petitioner's allegations that respondents in fact did the acts which constituted violations of consti-

tutional rights are sufficient" *Monroe v. Pape,* Supra at 208 (dissenting opinion).

Neither can the decision of this Court in *Pierson v. Ray,* 386 U.S. 547, 87 S. Ct. 1213, 18 L. Ed 2d, 288 (1967), be read as requiring proof of improper motive as an element of a cause of action under the Act. In declining to depart from the tradition of refusing review of a Court of Appeals' decision on matters of state law, the Court stated at footnote 12, page 558:

> ". . . petitioners' right to recover for an invasion of their civil rights, subject to the *defense* of good faith and probable cause, is adequately secured by §1983." (Emphasis added).

Although motive may be relevant to certain defenses to a civil rights action where it is also relevant to those defenses under the common law of the particular tort involved, bad motive should not be necessary to the statement of a cause of action under the Act if it is not an element of such tort under the common law. Under the generally prevailing law of false imprisonment, improper motive is certainly not an element of the cause of action. *Restatement of Torts,* §35, *Beckwith v. Bean,* 98 U.S. 266, at 276-277, 25 L.Ed. 124 at 128 (1879), *Nesmith v. Alford,* 318 F.2d 110, at 118 (5th Cir. 1965), *Waterman v. State,* 1 App. Div. 2d 235, 149 N.Y.S. 2d 381 (1956), affirmed at 2 N.Y. 2d 803, 159 N.Y.S. 2d 702, 140 N.E. 2d 551.

As stated by the Court of Appeals (Petition, App. 6a), some courts have construed the Act as limited to instances of reprehensible conduct. Petitioners rely upon *Striker v. Pancher,* 317 F.2d 780 (6th Cir. 1963) to show conflict in this regard. Although the precise holding in *Striker,* at page 783, was that the defendant sheriff

in an action under §1979 of the Act did not deprive the plaintiff of a constitutional right by advising him to plead guilty to a criminal charge, the Court did state, at page 784, that the statute is aimed at "reprehensible action." There is no conflict between the holdings in *Striker* and the instant case, because it is undisputed that the jailer's continued confinement of Respondent deprived him of constitutional rights. In demonstrating the type of "reprehensible conduct" to which the act is directed, the Court in *Striker* relied in large part on decisions of the Fifth Circuit, and in dismissing the action for failure to state a claim under §1979, the Court stated that it was following Seventh Circuit opinions. *Striker v. Pancher*, Supra at 784. With the instant case, the Fifth Circuit and Seventh Circuit are clearly in accord that there is no improper motive requirement under the Act. *Joseph v. Rowlen*, 402 F.2d 367 (7th Cir. 1968). There is no conflict between the decisions of these circuits and the dicta of the Sixth Circuit in *Striker* deserving of resolution by this Court.[1]

II. The sheriff's detention of Respondent after the dismissal of all charges was not privileged by virtue of good faith, probable cause, lack of negligence or lack of actual knowledge of the termination of legal authority for holding Respondent.

Under the holding of *Pierson v. Ray*, 386 U.S. 547, 87 S. Ct. 1213, 18 L. Ed. 2d, 288 (1967), the sheriff

1. It is by no means clear that the Sixth Circuit in the *Striker* case meant to imply that improper motive was required since, in listing cases of "reprehensible action", the Court cited *Egan v. City of Aurora*, 365 U.S. 514, 81 S.Ct. 684, 5 L.Ed. 2d 741 (1961), affirming in part and vacating and remanding in part 275 F.2d 377 (7th Cir. 1960), where bad motive is difficult to find.

undoubtedly was entitled to present those defenses to Respondent's action under the Civil Rights Act which would also be available as defenses to Respondent's common law action in false imprisonment. Unlike the facts involved in *Pierson* however, the facts of Respondent's cause do not invoke the law of false arrest. Good faith and probable cause which normally constitute a privilege in the context of an arrest, do not provide justification for the protracted detention involved in this case.

The sheriff and his surety were certainly free to show any facts which might raise the defense of privilege, but the record is devoid of any warrant, indictment or other mittimus authorizing the detention of Respondent other than those dismissed by the proper court on November 5, 1962. Instead, the sheriff defended on the grounds of his good faith, his lack of personal knowledge that his authority for confining Respondent had ended and his lack of personal knowledge that Respondent was being held in his jail or even existed. These contentions are logically reduced to an assertion of unavoidable mistake, which may be relevant to privilege although constituting no defense in itself. Prosser, *Law of Torts,* 80, 81 §17 (2d 1955).

Determining whether a mistake is privileged is largely a decision of social policy and balancing of interests. An officer is normally privileged to arrest without warrant if he acts reasonably and with probable cause, though mistakenly. In the law of arrest, the two interests involved are both of the highest order — the interest in personal liberty and the interest in initial apprehension of criminals. Harper and James, *The Law of Torts,* 275 §3.18 (1956). It is socially necessary that officers have leeway to make arrests under what are often stressful circumstances.

Once a person suspected of crime has been apprehended and the accusatorial process has begun, however, the social interest in insuring the presence of the accused at his trial should not extend a privilege to the jailer for such an enormous mistake as Respondent's detention. Unlike the arresting officer, the jailer normally acts at his leisure. The importance of the interest in personal liberty justifies the Court of Appeals' opinion that the risk of prolonged detention being unlawful, even if through good faith mistake, should fall on the jailer rather than the prisoner.

In addition to the balancing of social interest, there are other compelling reasons why the risk of this particular detention being unlawful was properly held to be with the jailer rather than the prisoner. The prisoner could not venture beyond the bars of his cell to check the status of his cases, yet the information that all such charges had been dismissed became a matter of public record in the official minutes of the Court (R. 138, 193-194, Pl. Ex. 35, R. 137). These records were maintained by the District Clerk in the same building in which the jail and other departments of the Sheriff's Office were located (R. 231). Certainly, the mode of communication between the Sheriff's Office and the District Clerk is a matter of business procedures to be worked out between those two departments and over which a prisoner could exercise no control. If the method adopted is faulty, this should not provide legal justification for unlawful detention.

The sheriff relies heavily on the jury's answer of "we do not" to the special interrogatory: "Do you find from a preponderance of the evidence that, in detaining William Whirl in custody after November 5, 1962, and up to and including July 25, 1963, C. V. 'Buster' Kern was

negligent as that term has been herein defined for you?" (Petition 2, 5; R. 696-697). Respondent's failure to obtain a jury finding of negligence, however, is irrelevant to the action of false imprisonment since there is no such tort as "negligent false imprisonment." *Forgione v. United States,* 202 F.2d 249, at 252 (3rd Cir. 1953).

Also irrelevant to Respondent's action against his jailer is the sheriff's contention that the Clerk of the Court made a mistake when he attached a copy of the Court's minutes containing a list of dismissed cases to the journal for delivery to the Sheriff's Office instead of preparing an individual dismissal order for each defendant (Petition, 4, 6; R. 178-179, 202, Pl. Ex. 3 at page 96, R. 99). That the Clerk may have breached a duty owed to the sheriff, as jailer, cannot justify an imprisonment without legal authority although the sheriff may have thus acquired an action over against the Clerk.

Under the Court of Appeals' opinion in this case, the sheriff is not without protection since: "His duty to his prisoner is not breached until the expiration of a reasonable time for the proper ascertainment of the authority upon which his prisoner is detained." (Petition, App. 35a). However, the Court was further of the opinion that what is or is not a reasonable time is not in issue in this case since: "It may be safely be said that Kern's ignorance for nine long months after the termination of all proceedings against Whirl was, as a matter of law, ignorance for an unreasonable time." (Petition, App. 35a-36a).

There is no conflict between this decision and the decisions of other Courts of Appeals cited by the sheriff and his surety (Petition, 9). The decision in *Daniels v. Van De Venter,* 382 F.2d 29 (10th Cir. 1967) merely

follows the holding of this Honorable Court in *Pierson v. Ray*, 386 U.S. 547, 87 S. Ct. 1213, 18 L. Ed. 2d, 288 (1967), that good faith and probable cause *in making an arrest* are defenses to an action under the Civil Rights Act based on false arrest. The issue of validity of an arrest is, of course, not involved in Respondent's action.

In *Dodd v. Spokane County, Washington*, 393 F.2d 330 (9th. Cir. 1968) the Court held that a complaint alleging a conspiracy, assault and threats of violence by various officers to force a prisoner to testify against another defendant should not have been dismissed for failure to state a cause of action under the Civil Rights Act. In stating, at page 335, that the defense of good faith and probable cause were available to defendants, the Court was speaking of a case in which no evidence had been adduced to show the true nature of the plaintiff's cause of action.

The decision of the District Court in *Bujaki v. Egan*, 237 F. Supp. 822 (D. Alaska 1965) (Petition, 9-10) dismisses a complaint, with leave to amend, for many deficiencies of pleading. The plaintiff had been held in jail for some 13 days after the Grand Jury had failed to indict him and a Court had ordered his discharge. The decision does mention the Civil Rights Act, at page 825, in connection with immunity of the prosecuting attorney, but the failure of the Court to find a duty to discharge plaintiff from jail, at 824, was apparently due to lack of such duty under Alaskan law. No such deficiency exists in Texas law. (Petition, App. 15a, ftn. 10; 18a-22a; 24a). In any event, the *Bujaki* case does not constitute such a conflict with the Court of Appeals' construction of the Civil Rights Act in this case as to justify certiorari. Even the judge writing the decision of dismissal in *Bujaki*, Supra at 825, reviewed the result as "unfortunate."

The specter raised by the sheriff and his surety of the increased burdens on jailers and their surety companies caused by this decision (Petition, 6-7, 10) is not nearly so fearful as the specter of illegal imprisonments for nine months, nine years or ninety-nine years, where no redress would follow simply because of a jailer's failure to know of Court proceedings which have become matters of public record (Petition, App. 17a). Whether that failure to know and failure to discharge resulted from malice, negligence or simple good-faith mistake is certainly relevant to issues of exemplary damages but was properly considered irrelevant by the Court of Appeals to the issue of liability for actual damages for the false imprisonment.

III. The sheriff's detention of Respondent after the dismissal of all charges was not privileged by virtue of a State Statute requiring the sheriff to safely keep all prisoners lawfully committed to his jail, subject to the order of the proper Court, and to exercise supervision and control over the jail.

In presenting a question as to the Court of Appeals' decision regarding Respondent's action under the Texas law of false imprisonment as well as the Civil Rights Act, the sheriff and his surety urge a Texas statute[2] as justification for the wrongful detention (Petition 3, 10, 11).

---

2. Article 5116 of the Texas Revised Civil Statutes provides as follows: "Each sheriff is the keeper of the jail of his county. He shall safely keep therein all prisoners committed thereto by lawful authority, *subject to the order of the proper court,* and shall be responsible for the safekeeping of such prisoners. The sheriff may appoint a jailer to take charge of the jail, and supply the wants of those therein confined; *but in all cases the sheriff shall exercise a supervision and control over the jail.* Act May 12, 1846, p. 268; G.L. vol. 2, p. 1574; Acts August 26, 1856, p. 88; G.L. vol. 4, p. 506." (Emphasis Added).

The sheriff construes the statutory command to safely keep prisoners "subject to the order of the proper Court" to impose a duty to hold a prisoner until actual receipt of a "proper order" to release. Since no "proper order" was actually received by him, the sheriff argues, he was privileged, and indeed under duty, to hold Respondent despite the undisputed fact that all criminal charges were dismissed by the proper Court. Such a construction does violence to the plain language of the statute and is contrary to the interpretation of such statute by the Texas courts.

That the sheriff is to act subject to order of the proper Court could not mean that the sheriff may act contrary to Court orders until such time that the Court delivers to the sheriff an order that the sheriff considers "proper." On the contrary, the sheriff's duty under this statute was well stated in *McBeath v. Campbell,* 12 S.W.2d 118 at 123 (Tex. Comm. App. 1929, holdings approved):

> "Certainly when the Sheriff finds out that a prisoner is confined in his jail, which the law makes him keeper of, and holds him responsible for, it is his duty to know by what authority he is confined therein, and he cannot close his eyes and fail to make an investigation and excuse himself on the ground of lack of knowledge; . . ."

While the sheriff disclaims knowledge that Respondent was in his jail until after his release (Petition,3), he also claims that the confinement was no secret since his office prepared a monthly jail list showing Respondent's name and case number (Petition, 4-5). The duty to exercise supervision and control over the jail in all cases surely required the sheriff to know the contents of his own jail lists, and the Court of Appeals' conclusion that the sheriff also had the duty to know the authority by

which he held Respondent for nine months is harmonious with applicable state law.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief was served upon all parties required to be served in accordance with Rule 33 of the Supreme Court by serving counsel for Petitioners by placing it in the United States Mail, postage prepaid, addressed to Messrs. B. Jeff Crane, Jr., William R. Eckhardt and James R. Bertrand, First City National Bank Building, Houston, Texas 77002, Attorneys for Petitioner, C. V. (Buster) Kern, and to Messrs. Sam H. Hood, Jr. and Russell Talbott, Bank of the Southwest Building, Houston, Texas 77002, Attorneys for Petitioner, Fidelity and Deposit Company of Maryland on this the 16th day of June, 1969.

Charles David Kipple

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